No. 12375.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ALLEN SMILEY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

PETITION FOR REHEARING.

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AUTHORITY CITED

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PETITION FOR REHEARING.

Allen Smiley, appellant herein, hereby respectfully petitions this court for a rehearing in this case. Appellant submits that the court has been led into serious fundamental error in several particulars:

(1) The court has premised its decision in affirming the conviction on Count 3 contained in indictment No. 20069 upon facts not pertinent to said count.

(2) The court has announced a number of erroneous conclusions of law as the basis of its decision, and

(3) The court failed to consider or determine grounds relied upon for reversal which are in themselves determinative of the appeal.

I.

The Court Has Premised Its Decision in Affirming the Conviction on Count 3 Contained in Indictment No. 20069 Upon Facts Not Pertinent to Said Count.

In testing the affirmed Count 3, all of the evidence pertaining to the two remaining counts, which were reversed by this court, must be excluded. The count affirmed related to an arrest by the Sheriff's office of Los Angeles County. There was no evidence whatsoever of any comity arrangements between the Sheriff's office and any other police agency respecting the interchange of information or that the Sheriff's office furnished any information gathered from booking slips at the time of a person's arrest to any other police agency whatsoever, or furnished any information to any agency, police or otherwise.

The sole testimony concerning this count came from the witnesses Siu, Becker and Hopkins. [R. 80, 92, 121.]

The sole testimony of the purpose of booking and the use made of the information was as follows:

The witness Siu testified on direct as follows:

> "Q. Mr. Siu, what we want here is: What is meant by 'booking'? A. 'Booking' is getting the information down on paper before we take them to the County Jail.
>
> Q. Then the prisoner is taken to the jail, is he? A. Yes.
>
> Q. And that information that you take down on paper, what happens to it? A. Well, that goes to the booking office, and that is copied on another piece of paper, I think it is triplicate.

Q. Do you know the *purpose* of the Sheriff's office in taking that information? A. *For a matter of record identification.*

Q. You have in your hand Exhibit 4, for identification, don't you? A. Yes." [R. 81, 82.]

This is the arrest slip [Ex. 4] made out by Siu, and contains nothing regarding citizenship.

"Q. Now, there is Exhibit 5 before you. Is that Exhibit 5 part of the booking procdure record? A. This was made out in the County Jail.

Q. Well, the question is, is it part of the booking record of Mr. Smiley on the occasion of that same arrest? A. Yes, it is." [R. 83.]

"Q. And is it a record that is required to be kept in connection with the booking of a prisoner under the circumstances that prevailed when Mr. Smiley was booked? A. Yes, it is kept by the County Jail booking office.

Q. Did Mr. Smiley give you the answers to any of the questions that appear on Exhibit 5, for identification? A. Well, the top part of this, where my signature is, is the same information that is on the arrest slip.

Q. As to the part below your signature, did you have anything to do with that? A. No, I didn't make that out." [R. 89.]

On cross-examination Siu testified:

"Q. Mr. Siu, directing your attention now to Exhibit 4 for identification, that is the slip that you had in your hand, was it not, and what you have been testifying from? A. Yes." [R. 85.]

"Q. Don't you, on occasions, frequently find a recalcitrant citizen who refuses to answer questions of police officers? A. Yes.

Q. And you still have to make a booking slip for identification purposes, don't you? A. Yes, sir.

Q. *And that is all this is, is simply to identify the individual whom you have under arrest?* A. *Yes.*

Q. *Now, there is no specific purpose beyond that for such booking slip?* A. *We make out a booking slip for identification and the charge that they are booked on.*" [R. 89.]

Ralph W. Becker, a Deputy Sheriff, testified that he was in charge of keeping the records "of the identification of persons booked in the Los Angeles County Jail"; that Exhibit 5 "is a booking slip of the Los Angeles County Jail"; that it was an original record and kept by him in the ordinary and regular course of business of the Los Angeles County Sheriff's office. [R. 93.]

The witness Hopkins, a Deputy Sheriff, testified that he asked Mr. Smiley questions contained on the booking slip, Exhibit 5, at the time of his arrest, and that it contained the information received from the prisoner [R. 122]; that Exhibit 5 is a record kept by the Sheriff's office in the regular and ordinary course of its business; "and acted upon by it in whatever business it has concerning the prisoner"; that it was required at the time that he made it out, to be preserved and kept as a record [R. 133]; that it is the customary procedure; that "the Sheriff himself supervised the formulating of that form that we used there"; that he found the form in the office, and was told to use that form in booking persons, and that is what he did. [R. 133-135.]

The foregoing is all of the evidence on the subject of use and purpose of the booking slip. In fact, the foregoing is all of the evidence on the third count unless the generalized testimony of the witness Hood would be considered pertinent.

We can see no relevancy at all to the testimony of Mr. Hood, which deals solely with the existing practice of the Federal Bureau of Investigation. Mr. Hood didn't testify that any information was received at all by his Bureau from the Los Angeles County Sheriff's office, either from finger print cards, booking slips, or from any other source. His testimony was confined solely to the practices of his Bureau and not to any practices whatsoever of the Sheriff's office. Aside from the foregoing testimony of the Deputy Sheriffs, there was no evidence whatsoever of any practice and procedure by the Sheriff's office in the use of booking slips. *There was no testimony that Exhibit 5, which contained the citizenship, was used for any purpose whatsoever.* There was only testimony of use and purpose concerning Exhibit 4 and this arrest slip did not contain the citizenship question; and as to this exhibit the testimony was that it was used by the Sheriff's office itself "for identification and the charge they are booked on." [R. 89.]

The appellant was not a known criminal, nor did he have a criminal record. There was no evidence concerning citizenship status being essential or material to the system established by the Sheriff's office. Even as to the arrest slip [Ex. 4] the evidence only disclosed that it was used to identify the individual and the charge. Of course, identity was fully established by name, address, age, height, color of hair and eyes, complexion, physical characteristics and finger prints.

II.

The Court Has Announced a Number of Erroneous Conclusions of Law as the Basis of Its Decision.

This court, on page 3, posed the basic question to be answered: "Does this answer constitute a representation *falsely* and *fraudulently* made to a person having good reason to inquire into the nationality status of appellant?" The court then said: "The allegations of the indictment and the provisions of subdivision 4, paragraph (18) of Section 746(a) require such a degree of proof to sustain the conviction." (Op. 3.) We interpret this question and statement of law as a holding that the cardinal requirements in this case were that (a) the person inquiring into the nationality status of appellant must be "a person having good reason" to so inquire; and (b) that the representation of citizenship must be both "falsely and fraudulently made."

It appears to us that this court, in reaching the conclusion that the appellant's answer to the Sheriff in connection with an arrest "on suspicion of book making" did so falsely and fraudulently to a person having good reason to inquire into appellant's nationality status departs from the holdings of all the other cases arising under this statute. The cases of this circuit, as well as of the other circuits, involve the established elements of the right legally, to inquire as to citizenship, materiality as to subject matter, deception as to material subject matter and the perpetration of fraud, *i.e.,* liquor licenses, registration to vote, supporting testimony of good character in aid of admission of an alien as an employee, radio licenses, employment, etc. In each of these cases there appeared affirmative action upon the part of the defendant to gain for himself

something which he otherwise would not have if his alienage was truthfully disclosed. In each case, the net result would, or could have been different, depending upon whether the individual was an alien or a citizen. There was direct fraud in each instance, not remote speculative possibility of future gain; also there was present in all these cases the co-existing legal right to inquire and legal obligation to answer truthfully.

In the present case, the Sheriff's system was his own; the defendant was not a party to it nor under any requirement to answer. As far as the appellant was concerned it was purely a unilateral matter. One can't defraud unless directly a party to the transaction. Mere presence alone does not suffice. The question involved here could be enlarged to any series of questions for information that might strike the Sheriff's fancy. There is no evidence of any purpose for asking the question. Nor is there any evidence of any advantage and benefit to the defendant in falsely answering the question, or evidence of the corrolary that the Sheriff was put to any disadvantage or suffered the loss of any benefit. And, the trial court instructed, the party who makes a false claim of citizenship must make "it at the time for the purpose of having the one to whom it is made believe it as true, to the advantage and benefit of the one making it." [R. 273.]

Again the trial court instructed that before a false statement as to nationality status would be an offense the person inquiring must be engaged "in an inquiry concerning a matter which made the nationality status of the defendant relevant and material to the matter under consideration." [R. 274, 275.] What was the matter then under consideration; the arrest of appellant on suspicion of bookmaking and at most his identity. Identity of the

person accused of suspicion of bookmaking is fully established by age, address, color of hair and eyes, complexion, physical characteristics and finger prints. Identity is and can be established wholly apart from citizenship. Citizenship is truly a status as distinguished from identity. Nationality status was not relevant or material to either the arrest or identity. There isn't even a shred of evidence as to purpose or use of Exhibit 5. The sole evidence is that it was a form used by the Sheriff.

This court in its opinion, seems to resolve that the existence of fraudulent purpose is proved by concealment from the Sheriff of his true nationality status because "it is fair to assume that appellant was concerned with future consequences." This court then states that "The three arrests and a pending investigation by the Immigration Department on a deportation charge warrants this conclusion. We see no other motive for the false statement and that it was 'made with intent to deceive * * *' as to a material matter."

The record, of course, discloses that compulsion and duress is practiced to obtain answers to the questions contained on the booking forms; that if an arrestee declines to answer, he is booked as a John Doe and incarcerated in a cell until he does answer the questions. [R. 89, 109, 110.] We also know that the Naturalization and Immigration Service was, through their previous investigation and his sworn testimony before them as well as his registration as an alien at all times, fully aware of his citizenship status. We also know that there is no evidence in the record of any exchange of information between the Sheriff's office and the Naturalization and Immigration Service. We also know that the charge here was for suspicion of bookmaking and a misdemeanor. *There were no future*

consequences that he could suffer by reason of disclosing his alienage; and this even if the Sheriff had a system of advising the Naturalization and Immigration Service concerning the arrest and charge.

Good moral character was and is not involved in the charge upon which he was arrested. We can take judicial notice that under the Immigration and Naturalization laws, no consequences adverse could have resulted because of an arrest for suspicion of gambling. There was not the slightest advantage and benefit gained by appellant by not truthfully disclosing his alienage; neither was the Sheriff put to any disadvantage or lose any benefit by reason of the answer given. **The results, advantages and benefits in all aspects would have been precisely the same if he had truthfully disclosed his alienage.**

We submit the test is not the narrow one of a person having "some right" or "a good and sufficient reason." Many persons qualify to ask nationality status on a premise of a "right" or "good and sufficient" reason, who do not have a right or adequate reason pursuant to official authority and duty, be that public or private as in the case of an employer. Such "right" or "good and sufficient reason" would exist in the case of a survey agency like Gallup in gathering information for a client concerning the attitude of the voters on a specific public issue. For example, in connection with ascertaining the view of the voters in order to assure integrity and accuracy of the survey the first question asked might well be "Are you a citizen of the U. S?" Under the holding of this Court, "we hold that where **some right** to inquire exists *or* the person inquiring *has a good and sufficient reason* for learning the citizenship of the person asked, it is sufficient (Op. 5)," a person in the Gallup survey example

would be guilty of an offense under this statute. This Court wholly fails to define either "some right" or "a good and sufficient reason." In the absence of a definition or the setting up of a standard establishing what is meant by these words, one can only conclude that what constitutes an offense has been broadened far beyond the decided cases.

This Court has said (Op. 4) that the courts have placed an interpretation beyond the literal sense of the language of the statute to the effect that the false statement must be made to a person who had "a good reason to inquire," and that it agrees with this interpretation. We have been unable to find any cases using the words "a good reason to inquire," or holding that the statute is violated if a false statement of nationality status is made to a person merely having "good reason to inquire." The *Achtner* case of course does use the language, "the representation * * * must still be made to a person having some right to inquire or adequate reason to ascertain * * * citizenship"; but it, also, sets up a standard that excludes as offenses mere untruths as to citizenship by tying together the "right to inquire or adequate reason" with fraud.

We cannot escape the conclusion that the false statement must be made to a person so situated, either in a public or private capacity, that the asking of it was in furtherance to his official authority and duty; and that the false statement would or could result in defrauding such person or his principals.

We submit that the opinion in the instant case is in conflict with the previous opinion of this court in the *DePratu* case, and is in conflict with the decided cases of other circuits.

III.

The Court Failed to Consider or Determine Grounds Relied Upon for Reversal Which Are in Themselves Determinative of the Appeal.

This court, at page 5 of the opinion, states: "The charging part of the indictments is in the language of the statute. This is sufficient in the instant case." In view of this Court's holding now that the answer must be *falsely* and *fraudulently* made we submit that the case of *United States v. Weber,* 71 Fed. Supp. 88, is precisely in point and that the indictment in the language of the statute is insufficient.

The indictment was challenged on the further ground that it does not appear therefrom that the person inquiring as to appellant's nationality status was: (1) a person to whom he was obligated to truthfully state the fact of citizenship, or (2) a person who had a legal right to inquire into, or an adequate legal reason for ascertaining his citizenship."

In neither the *DePratu* case nor the *Achtner* case was our second ground before the court. In fact, to our knowledge, these contentions have not been answered by this or any other court. We have set forth our views at page 33 of our opening brief and page 10 of our reply brief.

For the foregoing reasons, we earnestly urge that a rehearing in this case be granted; that further and a more extended consideration be given to the subjects hereinbefore discussed; and that the opinion of this Honorable Court upon the points hereinbefore mentioned be clarified.

Respectfully submitted,

OTTO CHRISTENSEN,
ROBERT NEEB,
Attorneys for Appellant.

Certificate of Counsel.

Otto Christensen, one of counsel for Allen Smiley, appellant in the above entitled cause, does hereby certify that the foregoing petition for rehearing is, in his opinion, well founded, and is not interposed for delay.

OTTO CHRISTENSEN,
Attorney for Appellant.